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IN THE SUPREME COURT OF THE UNITED STATES
1992 TERM

(3) (2)

Nos. 92-155 and 92-219

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, et al.,

Appellants

v.

NICK THEODORE, et al.,

Appellees

CARROLL A. CAMPBELL, JR.,

Appellant

v.

NICK THEODORE, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO DISMISS OR AFFIRM OF THE DEMOCRATIC PARTY OF SOUTH CAROLINA

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TABLE OF CONTENTS

Page

Constitutional and Statutory Provisions Involved..... 1

Introduction..... 2

Argument

1. The District Court protected the voting rights of black South Carolinians..... 3

2. Review by this Court now is premature and unnecessary, because the District Court adopted only an interim plan..... 17

3. The District Court took Section 2 into account..... 18

Conclusion..... 21

TABLE OF AUTHORITIES

Page

Graham v. South Carolina, C.A. No. 3:84-1430-15 (Order of July 31, 1984, appeal dismissed, 53 U.S.L.W. 3483 (Jan. 7, 1985)..... 4

NAACP v. South Carolina, C.A. No. 3:84-2865-8 (D.S.C. Order of May 29, 1986)..... 5

NAACP v. South Carolina Democratic Party, C.A. No. 3:88-2492-2 (D.S.C., Order of February 29, 1989), aff'd mem., 898 F.2d 146 (4th Cir. 1990)..... 5, 10, 13

South Carolina State Conference of Branches of NAACP v. Riley, 533 F. Supp. 1178 (D.S.C. 1982).. 4

Appellee Democratic Party of South Carolina ("Democratic Party") submits this motion to dismiss the above-captioned appeals, or, in the alternative, to affirm summarily the judgment of the Court below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are included in the appendices to the jurisdictional statements filed by the Statewide Reapportionment Advisory Committee ("SRAC") (referred to herein as "App.") and by Carroll Campbell, Governor of South Carolina ("Governor"); other relevant provisions may be included in

the appendices to the motions to dismiss or affirm filed by other appellees.

INTRODUCTION

The Democratic Party was an intervenor and participated in the trial of the consolidated actions below. App. 8-9. The Democratic Party anticipates that the Lieutenant Governor, Speaker Sheheen, and the Senate of South Carolina will present the Court with extensive briefing as to why this appeal should be dismissed or, in the alternative, why the lower court's decision should be affirmed.

In this motion to dismiss or affirm, the Democratic Party sets forth three principal reasons why the appeals should be dismissed or the decision below should be affirmed: (1) the three-judge

District Court took extra steps to protect the voting rights of black South Carolinians, in difficult circumstances; (2) the District Court's decision provides for an interim plan only, a plan that this Court need not now review; (3) the District Court considered Section 2 of the Voting Rights Act in crafting its plan and thus addressed the concerns raised by the appellants in their jurisdictional statements.

ARGUMENT

1. The District Court protected the voting rights of black South Carolinians.

At the outset, it is important to recognize the point from which the District Court started. The districting plans in place as of 1990 were all plans that had been instituted by the federal

courts in the 1980's and/or precleared by the Justice Department under Section 5 of the Voting Rights Act. None had been successfully challenged under Section 2 of the Voting Rights Act.

The congressional districts in South Carolina were drawn in 1982 by the District Court as a result of litigation brought by the NAACP and were never challenged under Section 2. South Carolina State Conference of Branches of NAACP v. Riley, 533 F. Supp. 1178 (D.S.C. 1982). App. 5-6.

A reapportionment plan for the state Senate was adopted by the District Court in 1984, Graham v. South Carolina, C.A. No. 3:84-1430-15 (Order of July 31, 1984), appeal dismissed, 53 U.S.L.W. 3483 (Jan. 7. 1985). The Legislature thereafter adopted a reapportionment plan, and it was precleared under Section

5 by the Justice Department. App. 5-6. The NAACP later brought a challenge to that plan under Section 2, but ultimately dismissed that action with prejudice. NAACP v. South Carolina, C.A. No. 3:84-2865-8 (D.S.C. Order of May 29, 1986). A Section 2 challenge was brought in 1988 to contest a special election in State Senate District 32; after a trial, the District Court found that black voters in that district had an equal opportunity to elect representatives, including the senator, of their choice and found no Section 2 violation. NAACP v. South Carolina Democratic Party, C.A. No. 3:88-2492-2 (D.S.C., Order of February 29, 1989), aff'd mem., 898 F.2d 146 (4th Cir. 1990).

A plan redistricting the state House was adopted by the Legislature in 1981, and it was precleared by the Justice

Department under Section 5. It was never challenged under Section 2. App. 6.

At the same time, during the 1980's, the black percentage of South Carolina's total population declined from 30.38% to 29.82%. App. 65. South Carolina's population shifted from urban and rural areas, where most of the black population resides, to suburban and resort areas. App. 66. Many of the majority black districts under the existing plans had declined dramatically in population or were much smaller than the ideal district size under the 1990 census. See App. 65-66 and n. 62; App. 70-71 and n. 69.

Despite the demographic changes, the District Court increased the number of majority black districts over those present under the plans created by the District Court or approved by the Justice Department during the 1980's. The

District Court drew a majority black congressional district, the first such district in recent South Carolina history. The Court refused to follow the disruptive and confusing plans offered by the appellants, drew its own majority black district while attempting to avoid disruptions of communities of interest and county lines, and successfully created a majority black district. App. 82-84. It is noteworthy that, despite the fact the Court rejected their plans, the appellants do not appear to direct their appeals at that aspect of the District Court's decision.

The District Court followed a similar course in drawing the state Senate and the state House districts. The Court rejected aspects of the plans offered by the appellants, which created serpentine, distended districts that

split small municipalities and stretched long distances or wound through several counties. At the same time, as compared with the plans established in the 1980's, the District Court created one additional Senate district with a black majority population and three additional Senate districts with a black majority voting age population. App. 67. In the state House, the District Court created two additional districts with a black majority population and three additional districts with a black majority voting age population. App. 72.

Finally, the District Court took these steps despite extensive evidence that, during the 1980's, black voters in South Carolina had had a great deal of success in electing candidates of their choice and had enjoyed a growing opportunity to participate in the

electoral process. Contrary to the suggestion of the SRAC, SRAC Juris. St. at 6, its evidence and that of the Republican Party and the Governor were extensively rebutted.

On cross-examination, experts for the plaintiffs had to admit that majority white electorates in South Carolina had elected a black sheriff, a black solicitor (South Carolina's equivalent of a district attorney), and numerous black county officeholders and school board members. Tr. of Dr. Ruoff's Testimony at 72-92, 95-96, 99 (February 19, 1992); Tr. of Dr. Ruoff's Testimony at 83 (February 27, 1992). Black state senators had been elected with substantial white support, while some white state senators had been elected in majority black districts with substantial black support and had admittedly been

extremely responsive to black concerns. Tr. of Dr. Arrington's Testimony at 20, 51 (February 21, 1992); NAACP v. Democratic Party, supra; Tr. of Dr. Ruoff's Testimony at 64-67 (February 19, 1992). A black state senator had overwhelmingly won the Democratic nomination for governor in 1990 against a white state senator in a primary electorate that was 57% white. The black senator had carried several majority white counties in the very areas where the plaintiffs were contending that blacks did not have an equal opportunity to participate in the electoral process. Tr. of Dr. Arrington's Testimony at 178-181, 232-234 (February 27, 1992); GOP Exhibit 94 at 83 and 85 (1990-1991 Annual Report of S.C. Election Commission); Democratic Party Exhibit 267; Tr. of Mr.

Ellisor's Testimony at 40-41 (February 25, 1992).

The plaintiff's expert also had to concede that the makeup of primary electorates resulted in black voters having substantial impact upon the outcomes of Democratic primaries and general elections, even when black citizens made up only 20 percent of the population. Tr. of Dr. Loewen's Testimony at 133-136 (February 19, 1992). This fact is particularly significant, because many of the contested areas were located in heavily Democratic areas.

Indeed, the evidence indicated that in some contested areas, the plaintiffs were complaining about polarization in partisan terms, rather than in racial terms. Tr. of Dr. Arrington's Testimony at 69-72 (February 21, 1992). In fact, in one contested area, the SRAC's expert

admitted, a black candidate who was a Republican got a majority of the white vote but a minority of the black vote, while a white candidate who was a Democrat received a majority of the black vote but a minority of the white vote. Tr. of Dr. Ruoff's Testimony at 84-86 (February 19, 1992).

At the same time, the direct evidence presented by the plaintiffs' experts was conspicuously weak. Some of the experts were ignorant of the facts of numerous elections in South Carolina. E.g., Tr. of Dr. Loewen's Testimony at 73-75, 130-132 (February 19, 1992); Tr. of Dr. Arrington's Testimony at 63, 69, 71 (February 21, 1992); Tr. of Dr. Ruoff's Testimony at 74-78 (February 27, 1992). One expert based his analysis almost entirely on elections that occurred prior to 1980; he based his

conclusion concerning racial polarization in the 1980's on elections in three state senate districts in 1984. Two of those seats were later won by black candidates who defeated white candidates, and one of those seats was the subject of a Section 2 challenge where the District Court expressly found that there was no Section 2 violation and that blacks in that district had an equal opportunity to elect representatives of their choice. Tr. of Dr. Loewen's Testimony at 73-75 (February 19, 1992); NAACP v. Democratic Party, supra; Tr. of Dr. Ruoff's Testimony at 65-66 (February 19, 1992); Tr. of Mr. River's Testimony at 147-148 (February 27, 1988). Another expert was extremely selective in his choice of elections; for example, he chose only 12 local primaries during the entire decade on which to base his conclusions, and 6

of those were located in only 3 districts. Tr. of Dr. Arrington's Testimony at 66-67 (February 21, 1992).

The selectivity of his approach was underscored by the fact that he based conclusions on a study of the outcome of the 1990 gubernatorial general election. That was an election in which the Democratic nominee, a black state senator, was challenging Gov. Carroll Campbell, an incumbent with high standing in the polls, millions of dollars in campaign funds, and the active support of the President. Tr. of Dr. Arrington's Testimony at 61 (February 21, 1992). At the same time, the expert did not consider the results of the Democratic primary, where the black Democratic nominee had overwhelmingly defeated another state senator, who was white, in a primary electorate that was 57% white.

Tr. of Dr. Arrington's Testimony at 68-69 (February 21, 1992). As one of the Judges commented during the trial concerning this testimony: "I have serious questions with his basis or his selectivity in statistics." Tr. of Dr. Arrington's Testimony at 179 (February 27, 1992).

Further, the evident weakness of the plaintiffs' evidence was underscored by the fact that the SRAC strenuously opposed the admission into evidence of an exhibit that presented a study of numerous elections in South Carolina -- an exhibit prepared by the SRAC's own expert and presented with an exhibit sticker to the defendants by the SRAC itself. Tr. of Dr. Ruoff's Testimony at 68-69, 93-95 (February 19, 1992). The elections surveyed by the SRAC expert included many where black candidates had

won in majority white districts or where white candidates had attracted sizeable black support. That exhibit, along with the admissions of the plaintiffs' experts on cross-examination, undermined the plaintiffs' claims that black voters in South Carolina during the 1980's and 1990's could participate equally in the electoral process only when extensively gerrymandered, supermajority black districts were created.

In sum, the District Court went further than the evidence required in order to design districting plans that recognized and furthered the voting rights of black South Carolinians. The appellants' only complaint is that the District Court did not adopt wholesale their extreme plans containing districts that were gerrymandered with only the appellants' aims in mind.

2. Review by this Court now is premature and unnecessary, because the District Court adopted only an interim plan.

The District Court's decision put in place only an interim plan. It is subject to change by the Legislature, and any legislative plan will be subject to Section 5 review. As explained above, in 1984 the Legislature adopted a state Senate plan that was reviewed under Section 5 after a court-ordered interim plan had been issued.

As important, an interested party with standing is free to bring an appropriate Section 2 challenge to the interim plan after the 1992 elections. Democratic and Republican primaries have been held under the new plan, and the general election is only a month away. The District Court was careful to provide that its Order did not have res judicata

effect. App. 42. Any appropriate Section 2 challenge in the future will have the benefit of complete discovery, the results of the 1992 elections, and a trial presenting extensive evidence under Section 2 in light of actual election returns. Review by this Court now is not only a waste of this Court's resources, it would be premature until a full Section 2 challenge is before the Court.

3. The District Court took Section 2 into account.

In fact, the District Court spent a substantial portion of its opinion explaining Section 2 concerns and detailing how it took them into account. App. 31-57. The District Court was faced with the exigencies of crafting an interim redistricting plan in time for summer primaries and a fall general

election. In fact, the Court had already postponed the filing dates, which had been scheduled for March and April, until June and the primary date, which had been scheduled for early June, until August 25. Because of the legislative timetable and the Governor's veto, the Court had very little time to deal with the complexities of redrawing the entire state for all three plans. Nevertheless, the Court expressly drew its plan to comply with the basic requirements of Section 2. App. 45-47; 56-57. The Court merely recognized the limitations of time and the unavoidable fact that it had to apply Section 2 in designing electoral maps that had not yet been put in place, rather than in reviewing an existing electoral map with the benefit of actual election results and a history of political campaigns.

In reality, the appellants are complaining that the Court gave interested parties two chances to present Section 2 issues to the federal courts. The District Court let the appellants present all the evidence they brought forward that bore on Section 2; none of the appellants' proffered evidence was excluded. The Court considered all that evidence in drawing the interim plans. In a subsequent Section 2 challenge, appropriate parties also can present whatever admissible evidence they may want a Court to consider. The District Court has done everything possible to ensure that reapportionment in South Carolina has the maximum possible review under Section 2.

CONCLUSION

There are no substantial issues presented by these appeals. The District Court protected the voting rights of black South Carolinians; the District Court fashioned interim plans only, plans that are subject to subsequent judicial challenge and/or legislative revision; and the District Court applied Section 2 in designing its plans. Any further action by this Court now would be unnecessarily disruptive and waste the time and resources of this Court and the litigants.

Therefore, the Democratic Party asks that the Court dismiss the appeals or, in the alternative, summarily affirm the District Court's judgment.

Respectfully submitted,

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